Supreme Court, U.S.
FILED
01-32 MAY 15 2001
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No. _____

In The

Supreme Court of the United States

ENRIQUE GARCIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Number 1

Whether a substantial basis existed for a magistrate to issue a search warrant for two separate homes, not near each other, allegedly containing marijuana growing facilities, under circumstances where an D.E.A. agent with six months experience, submitted an affidavit to the magistrate containing conclusory allegations that a reliable confidential source, that had been to both houses, told the agent (1) that the Petitioner ran a large marijuana operation, (2) that he saw a person in the Miami house smoking a joint of marijuana, (3) he was offered a job to deliver a box which he suspected and thought smelled like it contained marijuana, but he refused the job, and (4) heard the Petitioner talking on the phone from the other home about a bust of one of the Petitioner's marijuana operations, but never told the agent that he had observed anything, at either location, that was consistent with a grow house?

Number 2

Does an affidavit for a search warrant that contains an implicit negation of probable cause to search two particular separate homes and stale and uncorroborated information from an alleged confidential source, create a substantial basis for crediting it and for issuing a search warrant?

QUESTIONS PRESENTED – Continued

Number 3

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Whether a Substantial Basis Existed for a Magistrate to Issue a Search Warrant for Two Separate Homes, Not near Each Other, Allegedly Containing Marijuana Growing Facilities, under Circumstances Where an D.E.A. Agent with Six Months Experience, Submitted an Affidavit to the Magistrate Containing Conclusory Allegations That a Reliable Confidential Source, That Had Been to Both Houses, Told the Agent (1) That the Petitioner Ran a Large Marijuana Operation, (2) That He Saw a Person in the Miami House Smoking a Joint of Marijuana, (3) That He Was Offered a Job to Deliver a Box Which He Suspected and Thought Smelled like it Contained Marijuana, but Refused the Job, and (4) Heard the Petitioner Talking on the Phone from the Other Home about a Bust of One of the Petitioner's Marijuana Operations, but Never Told the Agent That He Had Observed Anything, at Either Location, That Was Consistent with a Grow House? 6

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OFFICIAL REPORT OF LOWER COURT CASE

The Petitioner did not receive a written, reported decision from the United States Eleventh Circuit Court of Appeals.

GROUNDS FOR INVOKING JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). The United States Court of Appeals for the Eleventh Circuit issued an Order on February 14, 2001 denying the Petitioner's motion for rehearing. As such, the ninety-day period for the filing of this petition would fall on Tuesday, May 15, 2001.

FEDERAL CONSTITUTIONAL PROVISIONS INVOKED

The Fourth Amendment of the United States Constitution provides " . . . no warrants shall issue, but upon probable cause. . . . "

STATEMENT OF THE CASE AND FACTS

The Petitioner was convicted, after trial by jury, in the United States District Court for the Southern District of Florida. Before trial, the Petitioner filed a motion to suppress the contents of two of his alleged homes, that had been searched after the issuance of a search warrant. The motion to suppress was denied. The Petitioner was adjudicated guilty of conspiracy to manufacture, or to

possess a controlled substance with intent to distribute it, in violation of 21 U.S.C. Section 841A.1 and 21 U.S.C. Section 846. In Count II of the Indictment, the Appellant was charged with a violation of 21 U.S.C. Section 841A.1; manufacture or possession of a controlled substance with intent to distribute. On April 30, 1999, the Appellant was sentenced to 150 months of incarceration, special parole of 5 years, and an assessment of $100.00. Thereafter, on August 24, 2000, the United States Court of Appeals affirmed the Petitioner's appeal to the United States Court of Appeals for the Eleventh Circuit. The Petitioner timely filed for rehearing, and on February 14, 2001, the Eleventh Circuit denied the Petitioner's petition for rehearing.

FACTS: The Petitioner, Enrique Garcia, was convicted at trial in the United States District Court for the Southern District of Florida, regarding the charge of conspiracy to manufacture, or to possess a controlled substance with intent to distribute it in violation of 21 U.S.C. Section 841A.1 and 21 U.S.C. Section 846 in Count I of the Indictment. In Count II of the Indictment, the Appellant was charged with a violation of 21 U.S.C. Section 841A.1; manufacture or possession of a controlled substance with intent to distribute. At trial, the bulk of the evidence against him concerned books, money and contraband that was seized by law enforcement, pursuant to a search warrant that was issued by a United States Magistrate for the United States District Court for the Southern District of Florida for two properties. One property was located at 20145 S.W. 284 Street in Homestead, Florida, and the other at 11240 S.W. 158 Street, Miami, Florida.

The application for a search warrant was by a Special Agent of the D.E.A. by the name of Lance Gibson. In his affidavit, Lance Gibson stated as follows:

> (1) I am a Special Agent of the D.E.A. assigned to the Miami Field Division Group 4. I have been a Special Agent of the D.E.A. for approximately six months, during which time I have been personally involved in investigations involving the possession, manufacture, distribution and importation of controlled substances, as well as methods used to finance drug transactions and launder drug proceeds. In addition, I can speak, read and understand Spanish fluently.
>
> (Paragraph 1 of Affidavit)

The Petitioner includes a copy of the said application in the Appendix. Paragraph Number 3 of the affidavit stated that on June 10, 1997, he received information from a reliable confidential source that has no criminal history, but provides information for monetary consideration. The affiant went on to say that the confidential source, referred to as CS, advised that the Petitioner, Enrique Garcia, is the head of an indoor marijuana cultivation organization, that operates several indoor grow houses, two of which are at the previously stated addresses: 20145 S.W. 284 Street in Homestead, Florida and 11240 S.W. 158 Street, Miami, Florida. The affidavit indicates that the CS had been to both houses the Government sought to search. In May of 1997, at the 20145 S.W. 284 Street address in Homestead, Florida, the CS stated that the Petitioner, Enrique Garcia, offered the CS employment in Garcia's indoor marijuana business and also, on another trip to the same location, overheard Garcia

speaking to his brother on the phone about a bust of one of his residences where marijuana was cultivated indoors. (Paragraph number 5 of the affidavit in support of search warrant). In May of 1997, the CS stated that a party was attended at 11240 S.W. 158 Street home in Miami, where an employee of Garcia's at the 20145 SW 284 Street, Homestead, Florida address was seen smoking marijuana. (Paragraph Number 6 of affidavit). Later in June of 1997, the CS visited Garcia at the 20145 SW 284 Street address in Homestead, Florida and was approached by an employee of the Petitioner and asked to deliver a package of something that smelled like marijuana; the CS declined. Additionally, an electric consumption analysis of both of the addresses revealed nothing remarkable, but the affidavit stated that, " . . . indoor grow houses sometimes bypass their electrical meters and steal a percentage of electricity." (See Page 4 of the affidavit). The affidavit was submitted to the magistrate on June 30, 1997. The reviewing magistrate, Magistrate Stephen Brown, issued a Report and Recommendation that denied the Petitioner's motion to suppress. He stated that the probable cause determination may be a closer question in this case than in some others. (R2259-5). Continuing on, Magistrate Brown stated that he felt that a basis of knowledge had been demonstrated by the CS's statements. (R2-259-4). He stated that he also considered the following:

> In two cases applying [United States v. Foree, 43 F.3d 1572 (11th Cir. 1995)], the Honorable William Hoeveler found that independent investigation by agents and information arising therefrom could provide additional, independent corroboration of the sources veracity.

> United States v. Abbell, 963 F. Supp. 1178, 1193-94 (S.D. Fla 1997); United States v. Smith, 897 F. Supp. 1448. (S.D. Fla. 1995).
>
> . . . The Smith case is further significant, in that in Smith, Judge Hoeveler noted that a magistrate judge is entitled to rely on the experience of an agent in determining whether probable cause exists. *Smith*, 897 F. Supp. at 1453 (citing United States v. Jenkins, 901 F.2d 1675 (11th Cir. 1990).
>
> (R2-259-4, 5).

Lastly, as a fallback position, the reviewing Magistrate stated that " . . . this Court finds that even if probable cause did not exist for the issuance of the warrant, the evidence should not be suppressed under the good faith exception to the exclusionary rule announced in *United States v. Leon*, 468 U.S. 897 (1984).

ARGUMENT NUMBER 3

WHEN CAN A COURT RELY ON AN AGENT'S EXPERTISE IN FINDING PROBABLE CAUSE TO ISSUE A SEARCH WARRANT?

The reviewing magistrate that issued the Report and Recommendation, Magistrate Brown, was clearly wrong as it related to his last position in upholding the search warrant. In this case, there was no articulation or demonstration by the affiant, Lance Gibson of the D.E.A., that he had an expertise in the analysis of electrical consumption incident to indoor marijuana growing operations that, by itself, would constitute probable cause. When Paragraph Number 1 of the application for search warrant is viewed

against the specific type of investigation in this case, his opinion as to probable cause could not be credited. See, *Johnson v. United States*, 333 U.S. 10 (1948) and *United States v. Strahan*, 674 F.2d 96 (1st Cir. 1982).

ARGUMENT NUMBER 1

WHETHER A SUBSTANTIAL BASIS EXISTED FOR A MAGISTRATE TO ISSUE A SEARCH WARRANT FOR TWO SEPARATE HOMES, NOT NEAR EACH OTHER, ALLEGEDLY CONTAINING MARIJUANA GROWING FACILITIES, UNDER CIRCUMSTANCES WHERE AN D.E.A. AGENT WITH SIX MONTHS EXPERIENCE, SUBMITTED AN AFFIDAVIT TO THE MAGISTRATE CONTAINING CONCLUSORY ALLEGATIONS THAT A RELIABLE CONFIDENTIAL SOURCE, THAT HAD BEEN TO BOTH HOUSES, TOLD THE AGENT (1) THAT THE PETITIONER RAN A LARGE MARIJUANA OPERATION; (2) THAT HE SAW A PERSON IN THE MIAMI HOUSE SMOKING A JOINT OF MARIJUANA; (3) THAT HE WAS OFFERED A JOB TO DELIVER A BOX WHICH HE SUSPECTED AND THOUGHT SMELLED LIKE IT CONTAINED MARIJUANA, BUT REFUSED THE JOB, AND (4) HEARD THE PETITIONER TALKING ON THE PHONE FROM THE OTHER HOME ABOUT A BUST OF ONE OF THE PETITIONER'S MARIJUANA OPERATIONS, BUT NEVER TOLD THE AGENT THAT HE HAD OBSERVED ANYTHING, AT EITHER LOCATION, THAT WAS CONSISTENT WITH A GROW HOUSE?

NUMBER 2

DOES AN AFFIDAVIT FOR A SEARCH WARRANT THAT CONTAINS AN IMPLICIT NEGATION OF PROBABLE CAUSE TO SEARCH TWO PARTICULAR SEPARATE HOMES AND STALE AND UNCORROBORATED INFORMATION FROM AN ALLEGED CONFIDENTIAL SOURCE, CREATE A SUBSTANTIAL BASIS FOR CREDITING IT AND FOR ISSUING A SEARCH WARRANT?

It is submitted that Magistrate Brown's conclusion that there was a basis of knowledge that was demonstrated by the amount of detail contained in the alleged CS's statements was incorrect for reasons set forth hereinafter, but necessarily was the only prong where there was any evidence to consider in assessing the application for search warrant. The Government, improperly, in completely conclusory terms, stated that the CS was a reliable confidential source in Paragraph number 3 of the affidavit, but set forth no specifics. As such, there was only the basis of knowledge route for the Magistrate to consider. Two factors are critical to determining whether an affidavit based on a confidential informant's tip provides a substantial basis for finding probable cause: (1) an explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first hand, entitles the informant's tip to greater weight than might otherwise be the case; and (2) corroboration of the tip through the officer's independent investigative work is significant. *United States v. Sonagere*, 30 F.3d 51, 53 (6th Cir. 1994). As stated in *United States v. Weaver*, 99 F.3d 1372, 79 (6th Cir. 1995), a suspect's name, address and description of the home could arguably be obtained by any passing person, and do not constitute particularized

facts of an incriminating nature. In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court reasoned that because the anonymous letter written was able to relate the Gates' travel plans in some detail, this made it proper to assume that he also had access to reliable information of the Gates' alleged illegal activities. As such, this means that even after Gates, corroboration of parts of the informant's tale is insufficient when the corroboration is of facts which could be generally known. It follows that a supposed corroboration may be so incomplete or generally stated by the police as to be of no value in bolstering the story of an informant whose basis of knowledge is unknown. See, 2 Search and Seizure – A Treatise on the Fourth Amendment, Section 3.3(f), Pages 178-179, Third Edition by LaFave.

It is submitted that there is not one bit of corroboration of any item allegedly provided by the CS in this case. To the contrary, the nature of the alleged criminality, namely indoor marijuana growing and the odors and structural changes that always accompany such operation, were testified about in the trial of this case. See the testimony of Special Agent Daniel Mahoney regarding his appearance at 12060 SW 210 Terrace in Miami, Florida concerning a related residence and smelling marijuana. (R5-114). The same was testified to regarding a related search of 20401 SW 122 Street in Miami, Florida by Special Agent William Smith of the D.E.A. (R6-128). The CS claimed that he was at both houses that were the subject of the search warrant application, yet he never gave law enforcement anything regarding suspicions or facts concerning the existence of the very two marijuana grow houses that law enforcement said it would find. There is

no other information, other than stale dated claims to having seen someone smoke a joint at the Miami address to be searched by search warrant and an alleged offer to deliver a box the CS believed contained or smelled of marijuana from the Homestead address. That alleged evidence was clearly stale. See 2 Search and Seizure, Section 3.7, Page 338 (3rd Edition 1996) by LaFave; *Andresen v. Maryland*, 427 U.S. 463, 96 S. Ct. 2737, 49 L. Ed.2d 627 (1976). There was no credible evidence of an ongoing type of criminality. Staleness is not just a function of time. *United States v. Spiken*, 158 F.3d 913 (6th Cir. 1993). Additionally, none of the CS's representations were admissions against penal interest to vouchsafe his credibility. *United States v. Farese*, 612 F.2d 1376 (5th Cir. 1980); *United States v. Weaver*, 99 F.3d 1372 (6th Cir. 1996).

In sum, the allegations that the confidential source, or informant, is credible, and that the Petitioner is the head of an indoor marijuana cultivation organization are all conclusionary allegations and as such, bare bone and should not be credited. See, *United States v. Weaver*, 99 F.3d 1372, 1378 (6th Cir. 1996). The good faith doctrine of *United States v. Leon*, 468 U.S. 897 (1984) does not apply to a bare bones affidavit. *United States v. Wilhelm*, 80 F.3d 116 (4th Cir. 1996); *United States v. Weaver*, supra, and *United States v. Barrington*, 806 F.2d 529 (5th Cir. 1986). Although, as the Fifth Circuit in *Barrington* and the Sixth Circuit in *Weaver* pointed out, the threshold question is whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization, quoting *Leon*, 468 U.S. at 922 n. 23, 104 S. Ct. at 3420 n.23, the reality is that the six month on the job affiant,

the D.E.A. agent, received help in filling out the application. It would be totally beyond the pale of credulity to believe that an attorney did not assist and/or review this affidavit before it was submitted to Magistrate Johnson to be issued. Certainly they knew that the very nature of the crimes alleged at two addresses was the functional equivalent of the train conductors of yore in places such as the paper factories in Georgia being able to sense their location, just by virtue of smell and other perceptions. There is no indication that the CS had access to intimate facts regarding each place to be searched, such as to inspire a belief that he actually saw, or participated in the events in question. Clearly, the agent and his supporting legal counsel should have known that more investigation was necessary since there was no meat on their proffered affidavit in support of the search warrant.

CONCLUSION

Marijuana, money and records were found at the two search warrant locations. It was crucial to the Government's case and actually led to other incriminating evidence. A writ of certiorari should issue to the United

States Court of Appeals for the Eleventh Circuit, and the lower court's denial of the motion to suppress should be reversed.

Respectfully submitted,

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APPENDIX

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10997
Non-Argument Calendar

D. C. Docket No. 97-00552-CR-1-1-JAL

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ENRIQUE GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(August 24, 2000)

Before TJOFLAT, EDMONDSON and BARKETT, Circuit Judges.

PER CURIAM:

Defendant-Appellant Enrique Garcia appeals his conviction and sentence for conspiracy to manufacture and to possess with intent to distribute marijuana. Garcia raises a sufficiency of the evidence claim;[1] he also argues

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[1] We will not discuss the sufficiency of the evidence; our review shows that ample evidence supports Garcia's conspiracy conviction.

that the district court erred in (i) failing to suppress evidence seized from his homes; (ii) admitting statements he made during execution of the search warrant;[2] (iii) allowing opinion testimony that items seized from his home were used commonly in drug manufacturing and distribution operations; and (iv) shifting the burden from the government to the defendant on certain sentencing issues. No reversible error has been shown; we affirm.

About the evidence seized from Garcia homes, Garcia argues that the underlying search warrant was issued without probable cause. Garcia's chief complaint is that the warrant was based largely on information obtained from a paid confidential informant ("CI") who was described as "reliable" but no information supported the CI's claimed reliability. Garcia also argues that (1) the CI failed to provide sufficient first-hand observations to support the CI's conclusion that Garcia was the head of an indoor marijuana-grow operation at the homes to be searched, and (2) the agent obtaining the warrant failed to corroborate the CI's information.

The magistrate judge found and concluded that the detail provided by the CI demonstrated the basis of the CI's knowledge. Also, the agent averred that his review

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[2] We will not discuss the admission of these statements; Garcia did not move to suppress these statements before the district court and now makes a *Miranda* claim for the first time. Fed.R.Crim.P. 12(b)(3) requires motions to suppress to be made before trial. Fed.R.Crim.P. 12(f) provides that failure to make a motion required to be made under Rule 12(b)(3) constitutes a waiver. Failure to raise timely this issue before the trial court results in a waiver of the issue on appeal. *See United States v. Chavez-Valencia*, 116 F.3d 127, 129, 130 (5th Cir. 1997).

of power bills for the properties indicated power usage consistent with indoor marijuana grow houses. Although the magistrate judge did not find that the agent's statements about power consumption alone established probable cause, these statements supplemented other evidence of probable cause. And, even if probable cause for issuance of the warrant was not established, under the good faith exception to the exclusionary rule announced in *United States v. Leon*, 104 S.Ct. 3405, 3420 (1984), the evidence was admissible. We agree.

A magistrate judge assessing whether an affidavit for search warrant sets forth probable cause must make a "practical, common-sense decision" about whether, under the "totality of the circumstances," a fair probability exists that the sought for evidence will be obtained. *Illinois v. Gates*, 103 S.Ct. 2317, 2332 (1983). When reviewing the magistrate's decision, we ask whether the magistrate had a substantial basis for concluding that probable cause existed. *Id.* The magistrate's determination is to be accorded great deference, *see United States v. Gonzalez*, 940 F.2d 1413, 1419 (11th Cir. 1991); it should be upheld even in marginal or doubtful cases. *See United States v. Lockett*, 674 F.2d 843, 845 (11th Cir. 1982). And, in evaluating whether the magistrate erred, we assess the evidence in the light most favorable to the government. *See United States v. Sweeting*, 933 F.2d 962, 964 (11th Cir. 1991).

While it would be the better practice to set forth in the search warrant affidavit the basis upon which the affiant concluded that the CI was reliable, the totality of the circumstances nonetheless support a finding that probable cause existed for the issuance of the search

warrant. The CI was asked by Garcia and his co-conspirators to assist in their marijuana-grow operation: his information was first-hand. Certain details provided by the CI were corroborated: Garcia's ownership of the two residences to be searched and Garcia's prior criminal history. The power consumption records offered further, albeit somewhat sketchy, corroboration. Under these facts, we can not say the magistrate lacked a substantial basis for finding probable cause. And, in any event, no sufficient reason has been advanced why the good faith exception articulated in *Leon* would not defeat Garcia's claim that the evidence should have been suppressed.

About Garcia's claim that it was error to allow agents who executed the search warrant to testify that certain materials found – documents containing notations of names and monetary amounts, rubber-banded cash, a sixty-pound scale, zip-lock bags, rubber-bands, PH testers – often were found at drug trafficking operations, we see no basis for reversal. Much of the testimony about which Garcia complains was not objected to at trial; that testimony is reviewed for plain error. *See United States v. Hernandez*, 896 F.2d 513, 523 (11th Cir. 1990). Testimony admitted over Garcia's objection is reviewed for abuse of discretion. *See United States v. Paul*, 175 F.3d 906, 909 (11th Cir.), *cert. denied*, 120 S.Ct. 1999). The agents expressed no opinion on Garcia's guilt or innocence. No reversible error has been shown.

About the sentence imposed, Garcia contests the district court's relevant conduct determination (which held him responsible for all of the marijuana involved in the conspiracy) and argues that the district court imposed improperly on Garcia the burden of proving relevant

conduct. Garcia also challenges the district court's application of a four-level supervisory-role enhancement and a two-level enhancement for possession of a weapon.

We review the district court's drug-quantity finding for clear error. *See United States v. Hansley*, 54 F.3d 709, 714 (11th Cir. 1995). The government bears the burden of proving drug quantity by a preponderance of the evidence. *See United States v. Ismond*, 993 F.2d 1498, 1499 (11th Cir. 1993). For sentencing purposes, a drug conspirator is liable for his own acts and the acts of others in furtherance of the activity that the defendant agreed to undertake and that are reasonably foreseeable in connection with that activity. *See id.* The government produced sufficient evidence to establish that Garcia played a supervisory role in the conspiracy; it was no error to shift the burden to Garcia to demonstrate that his co-conspirator's acts were not reasonably foreseeable to him. The district court committed no clear error in holding Garcia accountable for the entire number of marijuana plants involved in the conspiracy. *See United States v. Brazel*, 102 F.3d 1120, 1162 (11th Cir. 1997) (holding defendant responsible for entire amount of crack cocaine where defendant was leader in the conspiracy).

We review the district court's factual findings supporting enhancement for possession of a firearm for clear error. *United States v. Trujillo*, 146 F.3d 838, 847 (11th Cir. 1998). Commentary to the guidelines indicates that a two level enhancement should apply if a weapon is present unless it is "clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1(b)(1), comment. (n.3). Undisputed evidence showed two firearms were found at Garcia's ranch: one of the marijuana-grow

sites (owned by Garcia), and one co-conspirator stated the gun belonged to Garcia. Once the government showed by a preponderance of the evidence the presence of a firearm at the site of charged conduct or conduct relevant to the offense, Garcia bore the burden to then show that the connection between the offense and the firearm clearly was improbable. *See Trujillo*, 146 F.3d at 847. Garcia proffered no such evidence.

We review the district court's factual findings on the defendant's role for clear error, *see United States v. Beasley*, 2 F.3d 1551, 1562 (11th Cir. 1993); the government must prove existence of an aggravating role supporting a U.S.S.G. § 3B1.1(a) enhancement by a preponderance of the evidence. *See United States v. Alred*, 144 F.3d 1405, 1421 (11th Cir. 1998). The district court's factual findings that the conspiracy was extensive and involved five or more participants, and that Garcia was the leader and organizer of the criminal activity, were not clearly erroneous. No error has been shown in applying the enhancement under U.S.S.G. § 3B1.1(a).

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,
Plaintiff,

Case No. 97-552
CR LENARD

vs.

ENRIQUE GARCIA, et al.,
Defendants.
_____/

REPORT AND RECOMMENDATION

This cause is before this court on Defendant Enrique Garcia's Motion to Suppress, pursuant to an Order of Reference entered by the Honorable Joan A. Lenard, United States District Judge. This court has reviewed the Motion and the Response. Additionally, a hearing was held on March 26, 1998, at which this court heard argument of counsel.

FACTS

Defendant moves to suppress evidence seized as a result of the search of properties owned by him and located at 20145 S.W. 284th Street, Homestead, Florida and 11240 S.W. 158th Street, Miami, Florida. On June 30, 1997, Special Agent Lance Gibson of the Drug Enforcement Administration (DEA) presented applications for warrants to search the above properties. On June 30, 1997, Magistrate Judge Linnea R. Johnson reviewed the application and issued the warrant. Agents executed the warrant on July 3, 1997.

DISCUSSION

Defendant argues that the affidavit executed by Special Agent Gibson did not provide sufficient probable cause for the issuance of the warrant.

I. Sufficiency of Affidavits

It is well settled that probable cause will be found to support a warrant application when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The Supreme Court has stated that "probable cause deals 'with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Id.* at 241 (citation omitted). Accordingly, courts considering the sufficiency of warrant applications do not read supporting affidavits in a hypertechnical manner. "[R]ather, a realistic and common sense approach should be employed as to encourage recourse to the warrant process and to promote the high level of deference traditionally given to magistrates in their probable cause determinations." *United States v. Miller*, 24 F.3d 1357, 1361 (11th Cir. 1994).

Consistent with the general preference for warrant based searches, an issuing judge's probable cause determination, "is to be given great deference and is conclusive, if reasonable, absent arbitrariness." *United States v. Sweeting*, 933 F.2d 962, 964 (11th Cir. 1991). Therefore, "after-the-fact scrutiny by courts of the sufficiency of an

affidavit should not take the form of *de novo* review." *Gates*, 462 U.S. at 236.

In determining whether probable cause existed for the issuance of the warrant, this Court must examine " 'only information brought to the magistrate's attention' – that is, within the four corners of the warrant application.' " *Donovan v. Mosher Steel Co.*, 791 F.2d 1535, 1537 (11th Cir. 1986) (quoting *Aguilar v. Texas*, 378 U.S. 108 (1964)). In sum, the following information was contained in the affidavit in support of the warrant. A confidential source ("CS"), whom Agent Gibson described as "reliable," advised that (1) Defendant was the head of an indoor marijuana cultivation organization that operated several indoor marijuana grow houses, two of which were located at the subject addresses; (2) on one or more occasions at the 284th Street location, Defendant offered the CS employment in the organization; (3) on one occasion while visiting the 284th Street residence, the CS overheard a telephone conversation between Defendant and his brothers about a search at another residence which was involved in the organization; (3) on May 11, 1997 while attending a party at the 158th Street location, the CS observed a guard employed by Defendant and one of Defendant's friends smoking marijuana; (4) on or about June 13, 1997, the CS visited the 284th Street location and was approached by a member of the organization and was asked to deliver a package containing marijuana. A property check revealed that Defendant owned both properties. Additionally, the affidavit stated that Special Agent Gibson had compared FPL records for the two locations, and that the records indicated that there were considerable fluctuations in the FPL bill,

which Special Agent Gibson, in his experience, believed was consistent with indoor marijuana grow houses, especially when considering the factor that "indoor grow houses sometimes bypass their electrical meters and steal a percentage of electricity." Affid. at ¶¶ 9-10.

Defendant initially takes issue with the absence of any information regarding the veracity, reliability or basis of knowledge of the confidential source. In *United States v. Foree*, 43 F.3d 1572 (11th Cir. 1995), the Eleventh Circuit stated that when the allegation of reliability of a confidential informant is based solely on the affiant's reliability judgment, that allegation is "entitled to only slight weight." *Id.* at 1575-76. The Court further noted, however, that this does not end the analysis, in that "even if we entertain some doubt as to the informant's motives, [her] explicit and detailed description of alleged wrongdoing, along with a statement that the event was firsthand, entitles [her] tip to greater weight than might otherwise be the case." *Id.* at 1576 (citing *Gates*, 462 U.S. at 234). The Court further noted that under the "totality of the circumstances" test announced in *Gates*, " 'veracity' and 'basis of knowledge' are no longer viewed as independent prerequisites to a finding of probable cause: 'a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability' such as corroborating evidence gathered by law enforcement." *Id.* at 1576 (citing *Gates*, 463 U.S. at 233). In *Feree*, the Court found that the CI's reports demonstrated an adequate "basis of knowledge." *Id.* The Court then went on to determine whether the DEA surveillance in the case "constituted sufficient corroboration of the CI's veracity to

support an overall finding of probable cause." *Id.* The Court noted that veracity can be corroborated by "independently confirming that *what* [the informant] said is true" or by "creating circumstances under which [the informant] is unlikely to lie." *Id.* (emphasis in original). Defendant argues that in the instant case, because the independent actions of Special Agent Gibson do not tend to corroborate the substance of the CS' statements, the CS' statements should be discounted.

This Court first finds that in this case, a "basis of knowledge" has been demonstrated by the amount of detail contained in the CS' statements. This Court further finds that *Foree* is not dispositive, in that in *Foree*, the affidavit was based solely on the information provided by the informant, and the agents' surveillance of her activities. In this case, there was additional information provided by Special Agent Gibson. In two cases applying *Foree*, the Honorable William M. Hoeveler found that independent investigation by agents and information arising therefrom could provide additional, independent corroboration of the sources' veracity. *United States v. Abbell*, 963 F.Supp. 1178, 1193-94 (S.D. Fla. 1997); *United States v. Smith*, 897 F.Supp 1448, (S.D. Fla. 1995).

The *Smith* case is further significant, in that in *Smith*, Judge Hoeveler noted that a magistrate judge is entitled to rely on the experience of an agent in determining whether probable cause exists. *Smith*, 897 F. Supp. at 1453 (citing *United States v. Jenkins*, 901 F.2d 1075 (11th Cir. 1990). In this case, Special Agent Gibson averred that he had been a Special Agent with the DEA for six months,

during which time he was personally involved in investigations involving the possession, manufacture, distribution and importation of controlled substances. Although it does not provide probable cause in itself, this Court can consider Special Agent Gibson's statement concerning the fluctuation of the FPL bills in this case to supplement the other evidence of probable cause.

This Court finds that the probable cause determination may be a closer question in this case than in some others. However, in close cases, a magistrate judge's decision to issue a warrant should be upheld. *See e.g., Massachusetts v. Upton*, 466 U.S. 727, 734 (1984) (per curiam); *United States v. Ventresca*, 380 U.S. 102, 109 (1965). Accordingly, this Court finds that the probable cause determination in this case should be upheld.

II. Good Faith Exception

Furthermore, this Court finds that even if probable cause did not exist for the issuance of the warrant, the evidence should not be suppressed under the good faith exception to the exclusionary rule announced in *United States v. Leon*, 468 U.S. 897 (1984).

In *Leon*, the United States Supreme Court held that a magistrate's determination of probable cause is accorded great deference. The Court further held that even if a warrant is not supported by probable cause, suppression is not required if the officers acted in "good faith". However, the Court held that the "good faith" exception would not be applied, and suppression would still be appropriate under the following circumstances: (1) if the issuing judge or magistrate was misled by information in

the affidavit that the affiant knew was false or would have known was false except for reckless disregard of the truth; (2) where the magistrate wholly abandons his judicial role; (3) where the warrant is based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or (4) where the warrant is so facially deficient that the officers cannot reasonably consider it valid." *Leon*, 468 U.S. at 923, 104 S.Ct. at 3421; *United States v. Taxacher*, 902 F.2d 867 (11th Cir. 1990).

Defendant has not presented any evidence of the existence of any of the above situations. Accordingly, Defendant's motion should be denied on this basis as well.

RECOMMENDATION

Accordingly, it is the recommendation of this Court that Defendant Enrique Garcia's Motion to Suppress be **DENIED.**

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Joan A. Lenard, United States District Judge for the Southern District of Florida. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. *Loconte v. Dugger*, 847 F.2d 745 (11th Cir. 1988), *cert. denied*, 488 U.S. 958, 109 S.C. 397 (1988).

DONE AND ORDERED this 30th day of March, 1998 at Miami, Florida.

/s/ Stephen I. Brown
STEPHEN I. BROWN
U.S. MAGISTRATE JUDGE

cc: Honorable Joan A. Lenard
counsel on attached list

Karen E. Rochlin, Esq. (AUSA)
Stuart Adelstein, Esq.
Brian Bieber, Esq.
Eric Cohen, Esq.
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Stephen Rosen, Esq.
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Jack R. Blumenfeld, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10997-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ENRIQUE GARCIA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Feb. 14, 2001)

BEFORE: TJOFLAT, EDMONDSON and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for rehearing filed by Appellant, Enrique Garcia, is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES
CIRCUIT JUDGE

AFFIDAVIT

I, Lance Gibson, being duly sworn, depose and state as follows:

1. I am a Special Agent of the Drug Enforcement Administration (DEA) assigned to the Miami Field Division Group 4. I have been a Special Agent of the DEA for approximately six months, during which time I have been personally involved in investigations involving the possession, manufacture, distribution, and importation of controlled substances as well as methods used to finance drug transactions and launder drug proceeds. In addition, I can speak, read, and understand Spanish fluently.

2. This affidavit is submitted in support of an application that seeks authorization to search the residences of ENRIQUE GARCIA, located at 20145 S.W. 284th Street, Homestead, Florida and 11240 S.W. 158th St., Miami, Florida. The information contained in this affidavit is submitted for the sole purpose of supplying probable cause for a warrant to search the above stated locations. As a result, it does not contain all the information known regarding this investigation. The information in this affidavit is based upon my personal observations as well as information received from other law enforcement officers and sources of information.

3. On June 10, 1997, I debriefed a reliable confidential source, hereinafter referred to as the CS, at the Miami Field Division. The CS has no criminal history and provides information for monetary consideration. The CS advised that ENRIQUE GARCIA is the head of a [sic] indoor marijuana cultivation organization, that operates

several indoor marijuana grow houses, two of which are at the previously stated addresses.

4. On June 11, 1997, a criminal background check revealed that in May 1987, ENRIQUE GARCIA was arrested in or about Miami, FL and convicted for possession of marijuana.

5. On or about May of 1997, the CS stated that on more than one occasion at the residence of 20145 S.W. 284th Street, ENRIQUE GARCIA offered the CS employment in GARCIA's indoor marijuana cultivation organization. In or about May of 1997, while visiting the same location, the CS overheard a telephonic conversation between ENRIQUE GARCIA and his brothers, LUIS and TOMAS GARCIA. The CS sated that ENRIQUE GARCIA was screaming at LUIS GARCIA, telling him that it was all TOMAS GARCIA's fault because the local police did a consent search on an unspecified residence which was involved with GARCIA's indoor marijuana cultivation organization. The CS also stated that he heard ENRIQUE ask LUIS if the police found anything. The CS advised that ENRIQUE seemed relieved that nothing was seized. The CS subsequently learned that during that consent search, the police did not discover an unspecified quantity of marijuana that was concealed in the ceiling, and approximately $500,000.00 in drug proceeds taped to the bottom of drawers.

6. The CS stated that on May 11 (Mother's Day), 1997, the CS attended a party at ENRIQUE GARCIA's residence located at 11240 SW 158th Street, Miami, FL. The CS advised that he/she observed JOSE URBINA, a guard hired to protect ENRIQUE GARCIA's ranch located

at 20145 SW 284th Street, Homestead, FL, and a [sic] unidentified Nicaraguan male smoking marijuana at the party. The CS stated that the unidentified male is a friend of both ENRIQUE GARCIA and JOSE URBINA.

7. The CS also stated that on or about June 13, 1997, the CS visited ENRIQUE GARCIA's ranch located at 20145 SW 284th Street, Homestead, FL. The CS stated that he/she was approached by a member of ENRIQUE GARCIA's indoor marijuana cultivation organization and asked to deliver a package containing marijuana. The CS declined the offer, and stated that the CS could smell marijuana emitting from the package.

8. On June 4 and 17, 1997, property checks revealed that ENRIQUE GARCIA is the owner of both 20145 S.W. 284th Street, Homestead, Florida and 11240 S.W. 158th Street, Miami, Florida.

9. On June 1997, Florida Power and Light (FPL) records for 20145 S.W. 284th Street, Homestead, Florida indicated a fluctuating electric bill. FPL records were also attained for 28401 SW 202nd Avenue, Homestead, FL (Comparison 1) and 28525 SW 202nd Avenue, Homestead, FL (Comparison 2). The following are kilowatts (KWH) used for the period of May 1996 to May 1997:

20145 S.W. 284th Steet		Comparison 1		Comparison 2	
Date	KWH	Date	KWH	Date	KWH
05/30/97	3180	05/30/97	2220	05/30/97	2559
04/30/97	2291	04/30/97	1479	04/30/97	1971
04/01/97	1740	04/01/97	1946	04/01/97	1843
03/03/97	1661	03/03/97	1472	03/03/97	1643
01/30/97	1609	01/30/97	1147	01/30/97	1784
12/30/96	1713	12/30/96	1608	12/30/96	1728
11/27/96	1557	11/27/96	2590	11/27/96	1479
10/28/96	3503	10/28/96	1643	10/28/96	2222
09/27/96	2550	09/27/96	1920	09/27/96	2743
08/28/96	2842	08/28/96	2233	08/28/96	3042
07/30/96	3648	07/30/96	2661	07/30/96	3439
06/28/96	3792	06/28/96	4237	06/28/96	2308
05/30/96	3209	05/30/96	810	05/30/96	2293

The residence located at 20145 S.W. 284th Street, Homestead, Florida shows several months with high KWH usage, followed by several months of low KWH usage. In contrast, Comparisons 1 and 2 show a more even KWH usage. Although the KWH usage for the target residence is not overwhelmingly higher, indoor grow houses sometimes bypass their electrical meters and steal a percentage of electricity. The fluctuating pattern of electrical use for 20145 S.W. 284th Street, Homestead, FL is consistent with indoor marijuana grow houses.

10. On June 11, 1997, Florida Power and Light records for 11240 S.W. 158th Street, Miami, Florida indicated a fluctuating electric bill. FPL records were also attained for 11220 SW 158th Street, Miami, FL (Comparison 1) and 11210 SW 158th Street, Miami, FL (Comparison 2). The following are kilowatts (KWH) used for the period of May 1996 to May 1997.

11240 S.W. 158th Steet		Comparison 1		Comparison 2	
Date	KWH	Date	KWH	Date	KWH
05/27/97	3064	05/27/97	1341	05/27/97	3427
04/25/97	2241	04/25/97	1002	04/25/97	2977
03/27/97	2028	03/27/97	874	03/27/97	2995
02/26/97	1731	02/26/97	944	02/26/97	3051
01/27/97	1971	01/27/97	1137	01/27/97	3035
12/26/96	2460	12/26/96	966	12/26/96	3200
11/22/96	2203	11/22/96	919	11/22/96	3010
10/23/96	2109	10/23/96	993	10/23/96	3005
09/24/96	3396	09/24/96	1278	09/24/96	3553
08/23/96	3638	08/23/96	1284	08/23/96	3254
07/25/96	4355	07/25/96	1401	07/25/96	3218
06/25/96	3597	06/25/96	1227	06/25/96	2677
05/24/96	3069	05/24/96	1019	05/24/96	2287

The residence located at 11240 S.W. 158th Street, Miami, Florida shows several months with high KWH usage, followed by several months of low KWH usage. In contrast, Comparisons 1 and 2 show a more even KWH usage. Although the KWH usage for the target residence is not overwhelmingly higher, indoor grow houses sometimes bypass their electrical meters and steal a percentage of electricity. The fluctuating pattern of electrical use for 11240 S.W. 158th Street, Miami, Florida is consistent with indoor marijuana grow houses. Accordingly, I submit there is probable cause to believe that within 20145 S.W. 284th Street, Homestead, Florida and 11240 S.W. 158th Street, Miami, Florida, marijuana plants are located, along with equipment for the cultivation of marijuana. I further submit that various tools of the drug trade are located at these locations, including business and other records concerning ENRIQUE GARCIA his suppliers, his customers, and the cultivation and/or distribution of marijuana; ledgers, address books, answering machine tapes, cash, and/or drug proceeds; bills for electricity, beepers or cellular telephones; and firearms; all of which are further evidence of drug trafficking and money laundering.

FURTHER AFFIANT SAYETH NOT.

/s/ Lance R. Gibson
LANCE GIBSON, SPECIAL AGENT
U.S. DRUG ENFORCEMENT ADMINISTRATION

Subscribed and sworn to before me this
30 day of June, 1997.

/s/ [Illegible]
UNITED STATES MAGISTRATE JUDGE

ATTACHMENT A

The premises known as 20145 S.W. 284th Street is a ranch-style one story-single family house which is white in color with a reddish roof. There are two driveways in front of the residence, one of which is circular and one of which is straight. A green sign in front of the property has the words "The Avocado Pit."

The premises known as 11240 S.W. 158th Street is a white brick single family house with a black lamp post in the front yard and a white garage door. The front windows have bars. When facing the residence, the numbers 11240, which are gray, appear to the right of the garage door.